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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

CARL RILEY,

Defendant and Appellant.

B214684

(Los Angeles County  
Super. Ct. No. BA332961)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Craig E. Veals, Judge. Affirmed.

Cheryl Barnes Johnson, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Assistant Attorney General,  
Susan Sullivan Pithey and Tasha G. Timbadia, Deputy Attorneys General, for Plaintiff  
and Respondent.

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Carl Riley (appellant) pled no contest to one count of attempted extortion. (Pen. Code, § 524.)<sup>1</sup> Appellant admitted that he was a principal armed with a firearm during the commission of the offense (§ 12022, subd. (a)(1)), that he committed the offense at the direction of, in association with, or for the benefit of a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)(A)), and that he suffered a prior conviction for robbery (§ 211), which qualified as a prior “serious felony” under section 667, subdivision (a), and a prior “strike” under the Three Strikes Law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)).

Pursuant to the negotiated plea agreement, the trial court sentenced appellant to 15 years in state prison. On appeal, appellant contends the trial court abused its discretion by denying his postplea *Marsden*<sup>2</sup> request to substitute counsel. We affirm.

### **BACKGROUND<sup>3</sup>**

On November 21, 2007, at approximately 9:30 p.m., appellant approached Susan Reyna (Reyna) in front of her apartment and introduced himself as “Shysty” from Highland Park. Reyna understood the words “Highland Park” to mean that appellant was from a gang. Appellant informed Reyna that he was “taking care of his streets” and demanded “taxes” from her in the amount of \$2,000 up front and \$100 each subsequent week. If Reyna did not pay, appellant stated that he would “take care” of her “nice little family.” Reyna understood this as a threat of physical harm against her family if she did not pay appellant the money he demanded. Five days later, Reyna was again standing outside her apartment when appellant drove up in a truck and revved the truck’s engine. Appellant appeared to be waving a gun at Reyna.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

<sup>3</sup> Because appellant entered his plea of no contest prior to trial, our summary of the facts is taken from the evidence presented at the preliminary hearing.

Los Angeles Police Department (LAPD) Officer Carlos Langarica testified that when he conducted a parole search of appellant's home, he found a poster with Highland Park gang graffiti, a black metallic box with more gang graffiti and the word "Shysty" written on it, and photographs of appellant with known gang members depicting gang signs. During the parole search, appellant told Officer Langarica that he was a member of the Highland Park gang.

LAPD Officer Robert Morales testified that appellant's collection of "taxes" from members of the community benefitted the Highland Park gang because it provided the gang with income to buy guns and drugs, and elevated its reputation among rival gangs. The parties stipulated that the Highland Park gang was a criminal street gang within the meaning of section 186.22, subdivision (f).

### **CHARGES AND PLEA**

The prosecution charged appellant with the following: attempted extortion (count 1; § 524), exhibiting a firearm (count 2; § 417, subd. (a)(2)), criminal street gang conspiracy (count 3; § 182.5), and conspiracy to commit a crime (count 4; § 182, subd. (a)(1)).<sup>4</sup> The information further alleged as to all counts that appellant committed the charged offenses at the direction of, in association with, or for the benefit of a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22, subds. (b)(1)(A) & (d)), and as to counts 1, 3, and 4, that a principal was armed with a firearm during the commission of the offenses (§ 12022, subd. (a)(1)). Additionally, the information alleged that appellant had suffered a prior conviction for robbery, which was a "serious felony" and a prior "strike." (§§ 1170.12, subds. (a)-(d), 667, subds. (a)-(i)).

On March 21, 2008, appellant, represented by private counsel, pled not guilty to all counts and denied the allegations. On June 24, 2008, private counsel moved to

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<sup>4</sup> A codefendant who was present when appellant attempted to collect "taxes" from Reyna was also charged in the same information with the conspiracy counts.

withdraw and the trial court granted the motion. A bar panel attorney was appointed as defense counsel. On September 24, 2008, the parties informed the trial court that a possible disposition was being discussed and the matter was continued.

On October 21, 2008, the following negotiated plea was announced. Appellant would plead no contest to the attempted extortion count (count 1) and admit the firearm, gang, and prior felony conviction allegations, and the prosecution would dismiss the remaining counts against him. Appellant would receive a sentence of 15 years in state prison.

Appellant was advised of the constitutional rights waived by such a plea. Appellant was asked whether any promises, other than those announced as part of the plea, were made in exchange for his no contest plea and admissions, and he answered “no.” Appellant was asked whether anyone had threatened him into pleading no contest and admitting the allegations, and appellant answered “no.” Appellant was asked whether he believed pleading no contest was in his best interest, and whether his plea was free and voluntary, and he answered “yes” to both questions. Appellant further stated that he understood a no contest plea had the same effect as a guilty plea. Appellant then pled no contest to one count of attempted extortion and admitted the firearm, gang, and prior felony conviction allegations. The trial court found that appellant’s constitutional waivers were knowing, intelligent, and competent, and that a factual basis existed for the plea.

#### **MARSDEN HEARING**

On January 7, 2009, the date on which sentencing was scheduled to take place, defense counsel explained that appellant wanted to withdraw his plea and bring a motion to substitute counsel under *Marsden*. The trial court asked defense counsel the grounds for appellant’s motion to withdraw his plea. Defense counsel conceded that he could not point to “anything overtly wrong about the plea, or technically wrong,” but noted that it was within the trial court’s discretion to permit appellant to withdraw his plea. The trial

court noted that it was disinclined to grant the motion simply because appellant changed his mind about wanting to plead no contest.

The trial court then cleared the courtroom, but for appellant and defense counsel, for the *Marsden* hearing. Appellant stated the following: “The reason I wish to withdraw my plea is because my attorney led me to believe that I did not have a good defense to put on at a jury trial. So after being under so much pressure and stress, the only option he left me with was to take the deal for 15 years for myself and six years [for my codefendant]. Ultimately, your Honor, nobody knows [this] case better than myself. . . . After finally receiving partial copies of police reports, as well as prelim transcripts, I noticed multiple inconsistencies, key issues, along with dates and times, that I consider crucial in regards to my case that I brought to [defense counsel’s] attention, that he brushe[d] off as being irrelevant and insignificant. With respect to the court, your Honor, I wish to withdraw my no contest plea and set this case for trial. And, second, I wish to no longer be represented by [defense counsel] due to several conflicts of interest.”

Defense counsel responded: “I don’t disagree with anything that Mr. Riley said. Basically, he pointed out inconsistencies in the case. He pointed out various parts that he wanted to look at, various theories, various theories of gang expertise. *We did go over that.*” (Italics added.) Defense counsel noted that appellant was “very intelligent” and his points were “well thought out.” Defense counsel stated that he would have raised some of appellant’s points during witness examination or argument. Ultimately, however, defense counsel did not think that “on balance” the issues raised by appellant “would weigh against a conviction,” in light of the gang evidence found at appellant’s house and the eyewitness testimony implicating appellant in the charged crimes. Based on “the circumstantial evidence, as well as the direct evidence,” defense counsel believed that “the probabilities of conviction were greater, significantly greater, than acquittal.” Defense counsel noted that appellant’s maximum exposure for the charged crimes was effectively a life sentence and that it would have been difficult for appellant to take the

stand given his prior criminal record. Thus, he believed that the prosecution's offer of 15 years, while not generous, was certainly "viable."

The trial court asked appellant if he had any additional grounds to raise in the *Marsden* hearing. Appellant answered in the negative. The trial court denied appellant's motion to substitute counsel, stating that appellant had failed to provide a legitimate reason for relieving defense counsel.

The trial court sentenced appellant to the agreed upon 15 years as follows: three years (the high term) for the underlying offense, doubled to six years for the prior strike, plus three years (the midterm) for the gang allegation, five years for the prior serious felony, and one year for the firearm allegation.

### **DISCUSSION**

Appellant argues that the trial court "failed to exercise its full discretion under *Marsden*, in that it failed to consider whether the conflict between appellant and counsel was likely to result in ineffective representation." Appellant seeks remand for another *Marsden* hearing.

As reiterated by the California Supreme Court in *People v. Mungia* (2008) 44 Cal.4th 1101: "In [*Marsden, supra*, 2 Cal.3d 118], we held that a defendant is deprived of his constitutional right to the effective assistance of counsel when a trial court denies his motion to substitute one appointed counsel for another without giving him an opportunity to state the reasons for his request. A defendant must make a sufficient showing that denial of substitution would substantially impair his constitutional right to the assistance of counsel [citation], whether because of his attorney's incompetence or lack of diligence [citations], or because of an irreconcilable conflict [citations]. We require such proof because a defendant's right to appointed counsel does not include the right to demand appointment of more than one counsel, and because the matter is generally within the discretion of the trial court. [Citation.]' [Citation.] When reviewing whether the trial court abused its discretion in denying a *Marsden* motion, we consider whether it made an adequate inquiry into the defendant's complaints. [Citation .]"

(*People v. Mungia*, *supra*, 44 Cal.4th at pp. 1127–1128; *People v. Smith* (2003) 30 Cal.4th 581, 606; *People v. Ortiz* (1990) 51 Cal.3d 975, 980, fn. 1.)

We conclude that the trial court did not abuse its discretion in denying appellant’s motion to substitute counsel under *Marsden*. The trial court properly held a hearing during which it allowed appellant to state the nature of his complaints fully. After providing defense counsel with the opportunity to respond, the trial court asked appellant whether he had any additional complaints before the court made its ruling. After appellant stated that he had no complaints other than those already articulated, the trial court ruled that appellant had failed to state a legitimate reason why substitute counsel was warranted. Implicit in this ruling was the trial court’s conclusion that appellant was unable to establish that defense counsel was incompetent, or that an irreconcilable conflict existed between appellant and counsel that would make effective representation unlikely. There is nothing in the record to suggest that the trial court myopically focused only on defense counsel’s purported incompetence.

The record also belies appellant’s contention that “trial counsel had agreed that there was such a [substantial] conflict” that would make effective representation unlikely. At the *Marsden* hearing, defense counsel stated that he agreed with many of the inconsistencies and weaknesses identified by appellant in the prosecution’s case and specifically stated that they went over those issues together. Ultimately, however, defense counsel believed that the inconsistencies and weaknesses could not overcome the direct and circumstantial evidence, including eyewitness testimony, implicating appellant in the charged crimes. At no point did defense counsel agree that a substantial conflict existed between him and appellant that would render his representation ineffective.

Additionally, as the People correctly point out, the conflict that existed between appellant and defense counsel boiled down to whether the inconsistencies and weaknesses identified by appellant were crucial, as appellant believed, or irrelevant, as appellant claimed defense counsel believed. Differences in trial strategy do not necessitate substitution of counsel under *Marsden*. (*People v. Welch* (1999) 20 Cal.4th

701, 728–729 [“A defendant does not have the right to present a defense of his own choosing, but merely the right to an adequate and competent defense. [Citations.] Tactical disagreements between the defendant and his attorney do not by themselves constitute an ‘irreconcilable conflict’”]; *People v. Lucky* (1988) 45 Cal.3d 259, 281–282 [“There is no constitutional right to an attorney who would conduct the defense of the case in accord with the whims of an indigent defendant. [Citations.] Nor does a disagreement between defendant and appointed counsel concerning trial tactics necessarily compel the appointment of another attorney”].)

In sum, we conclude that the trial court exercised its full discretion in denying appellant’s *Marsden* motion, and that there was no abuse of discretion.<sup>5</sup>

### **DISPOSITION**

The judgment is affirmed.

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\_\_\_\_\_, P. J.  
BOREN

We concur:

\_\_\_\_\_, J.  
DOI TODD

\_\_\_\_\_, J.  
CHAVEZ

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<sup>5</sup> Because we reach the merits of appellant’s claimed error, we need not address the People’s threshold argument that appellant waived any *Marsden* error by entering into a valid plea and waiver.